No. 82-1293

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JEREMIAH TEMPLE, et al.,
Appellants,

v.

ALABAMA PUBLIC SERVICE COMMISSION
and ALABAMA POWER COMPANY,
Appellees.

On Appeal from the Supreme Court
of the State of Alabama

JOINT MOTION OF APPELLEES ALABAMA PUBLIC SERVICE COMMISSION AND ALABAMA POWER COMPANY TO DISMISS APPEAL

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On Appeal from the Supreme Court
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JOINT MOTION OF APPELLEES ALABAMA PUBLIC SERVICE COMMISSION AND ALABAMA POWER COMPANY TO DISMISS APPEAL

Appellees, the Alabama Public Service Commission and Alabama Power Company,[1] respectfully move the Court to dismiss the subject appeal from the Supreme Court of the State of Alabama. This joint motion is submitted pursuant to Rule 16.1 of the Rules of the Supreme Court of the United States, and is based upon the following grounds: (i) the challenged

[1]In accordance with Rule 28.1 of this Court, a listing of all parent companies, subsidiaries and affiliates of appellee Alabama Power Company follows: The Southern Company, a registered public utility holding company, is the parent company of and owns all the common stock in Alabama Power Company. Other subsidiaries of The Southern Company are Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Services, Inc. and Southern Electric International, Inc. Alabama Power Company owns a 50% interest in Southern Electric Generating Company.

state statutes were never drawn in question; (ii) the federal challenge to the state statutes was neither properly or timely raised, nor was it passed upon by the court below; (iii) the decision below rests on adequate and independent state law grounds; and (iv) the appeal does not present a substantial federal question.

OPINIONS BELOW

The references to the orders and opinions of the Supreme Court of Alabama set forth in the Jurisdictional Statement are correct. Shortly before the Jurisdictional Statement was filed, the appellants solicited a certificate from the court stating that the court considered and passed upon the constitutional questions first raised by the appellants on rehearing. By order dated February 17, 1983, the Supreme Court of Alabama declined to issue this certificate. (*See* Appendices A and B hereto).

JURISDICTION

For the reasons set forth in this motion to dismiss, the appellees contest the jurisdictional basis for this appeal.

STATEMENT OF THE CASE

The proceedings which gave rise to the subject appeal involve the final disposition by the Alabama Public Service Commission ("the Commission") of two general rate cases of Alabama Power Company ("the Company"). The first case involved a retail rate filing by the Company in December, 1978 and subsequent appeals of the Commission's order in that proceeding to the Supreme Court of Alabama ("case 1").[2] On appeal, that court found the Commission's order to result in an unconstitutional taking of the Company's property without just compensation.[3] Case 1 was remanded to the Commission for further proceedings consistent with the court's opinion.

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[2]Case 1 was designated APSC Docket No. 17667.

[3]Alabama Power Co. v. Alabama Pub. Serv. Comm'n, 390 So. 2d 1017 (Ala. 1980).

During the pendency of the appeal in case 1, the Company filed another request for an increase in its general retail electric rates ("case 2").[4] The eleven individual appellants herein petitioned to intervene in case 2 before the Commission, and were allowed to participate in that proceeding in their respective individual capacities.[5] On July 28, 1980, the Commission issued an order in case 2, which granted the Company $30.6 million of its requested $122 million increase in rates. The Company appealed this order directly to the Supreme Court of Alabama pursuant to Alabama Code § 37-1-140 (Supp. 1982), and immediately requested a stay of the Commission's order and permission to collect that portion of the denied rate increase under supersedeas bond, as provided in Alabama Code § 37-1-141 (Supp. 1982). On August 13, 1980, the court granted the Company's request and allowed the Company to collect the full amount of the requested rate increase (subject to refund) following the posting of the required bond.

After case 1 had been remanded with instructions to the Commission and while case 2 was pending on appeal, the Commission initiated public discussions with the parties in both cases with the stated objective of resolving these two cases. Following extended public discussions, the amount of increase was generally agreed upon by all of the parties. The appellants tentatively agreed to this settlement amount, but insisted upon the inclusion of a $3.00 monthly customer service charge in

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[4]This proceeding, instituted by a filing in December, 1979, was designated APSC Docket No. 17859.

[5]The fact that these appellants represented only themselves before the Commission and the Supreme Court of Alabama negates their assertion that "approximately 900,000 residential customers of the Company . . . could be effected [sic] by the outcome of this appeal." (Jurisdictional Statement, p. 8). The appellants were not granted any representative status and they do not represent the residential class of customers. Under Alabama law, the Attorney General is charged with the statutory duty of representing the affected customers of the utility in rate cases before the Commission and the courts. Ala. Code § 37-1-16 (Supp. 1982).

the residential rate structure.[6] The appellants stated that they would oppose the settlement in its entirety unless the Commission capitulated on this rate design issue. Thus, they did not join in the setttlement because of the Commission's decision to incorporate a $3.75 customer charge in the settlement rate level.

In order for the Commission to have jurisdiction to enter a final order implementing the settlement of cases 1 and 2, it was necessary for the parties to petition for a remand of case 2 from the Supreme Court of Alabama.[7] Consequently, a joint motion for remand was submitted to the court, which set forth the reason for the requested remand. A copy of the order which the Commission proposed to enter to resolve the two cases was attached to the motion as an appendix. Further, the joint motion contained a specific request that the court discharge the Company's separate supersedeas bonds posted in connection with cases 1 and 2 upon the entry of the appended order by the Commission.

Because the individual appellants herein did not join in the joint motion for remand, the court issued an order soliciting briefs from all non-consenting parties and further ordering a hearing with respect to their respective positions regarding the joint motion. Though not objecting to remand per se, these appellants expressed to the court their dissatisfaction with the Commission's order to be entered upon remand. The court thereafter granted the joint motion, and the Commission immediately entered a final order on March 12, 1981 imple-

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[6]In Alabama, the residential rate has traditionally been made up of two components: (i) the energy or kilowatt-hour charge, and (ii) the customer service charge. The energy charge varies with the amount of electricity used, while the customer service charge is a fixed charge which is billed to each customer monthly regardless of his usage. This latter charge is designed to recover costs which do not vary with usage, such as meter reading and other billing expenses.

[7]Under Alabama law, an appeal of a Commission rate order divests the Commission of jurisdiction to enter further orders respecting the matter on appeal. Walker v. Alabama Pub. Serv. Comm'n, 292 Ala. 548, 297 So. 2d 370 (1974).

menting the settlement rate level, including the $3.75 customer service charge.[8]

By order dated March 20, 1981, the Supreme Court of Alabama discharged the Company's supersedeas bonds posted in connection with cases 1 and 2. This order was in response to the joint motion, wherein such discharge was specifically requested. Significantly, the appellants did not object to either the request for discharge contained in the joint motion, or the court's order granting the same.

On April 14, 1981, the appellants took a direct appeal from the Commission's order as it related to case 2. At no time prior to rehearing did the appellants bring before the court the objections to the supersedeas statutes which now constitute the sole basis for their appeal to this Court. They did not make application for supersedeas as individual customers of the Company, nor did they seek a stay or other extraordinary relief in furtherance of their appeal.[9] Despite their alleged indigent status, they did not file for leave to proceed *in forma pauperis* as provided in Rule 24 of the Alabama Rules of Appellate Procedure. These appellants simply chose to proceed with their appeal without ever requesting any form of extraordinary relief, whether by statute, rule of court, or otherwise.

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[8]The settlement rate level was less than the rate level the Company was then collecting under supersedeas bond. Thus, the Company was required to refund to its customers a portion of the revenues collected during the prior seven months under the supersedeas bond in case 2. The appellants' assertion that the settlement was made "retroactive" mischaracterizes the Commission's settlement order and the purpose of the Alabama supersedeas statutes (Jurisdictional Statement, p. 4).

[9]The Supreme Court of Alabama has *never* construed or interpreted the supersedeas statutes as they apply to individual residential customers, because no such customer has *ever* filed with that court an application for supersedeas seeking to stay the effect of a Commission rate order. Thus, those portions of the appellants' "Statement of the Case" which repeatedly refer to the requirement that they would have had to post a bond of $50 million are based solely on the appellants' *assumed* construction of the statute. In no case has the Supreme Court of Alabama so interpreted the statute in question, and the court was neither requested nor required to interpret the statute during the appeal below.

While the appellants' appeal of case 2 was pending before the Supreme Court of Alabama, the Company filed completely new rate schedules with the Commission. The purpose of this filing was to implement a new energy cost recovery clause, which clause was the product of a separate complaint proceeding initiated by the Commission.[10] The rates incorporating this new clause were approved by Commission order dated June 22, 1981. Thereafter, the Supreme Court of Alabama ruled, in response to a motion filed by the appellees, that the appellants' appeal in case 2 was moot because of the subsequent action of the Commission establishing new rate schedules. This ruling by the court was made after all parties to that appeal had fully briefed the issues raised in that appeal including, but not limited to, the question of mootness.[11]

Following the court's dismissal of their appeal in case 2, the appellants filed with the court an application for rehearing, together with a brief in support thereof. In this application, the appellants attempted to raise *for the first time* the constitutional questions which are the basis for their appeal to this Court. The Supreme Court of Alabama denied rehearing in a *per curiam* order dated November 5, 1982, with all Justices concurring. No written opinion was issued by the court (Jurisdictional Statement, Appendix B).

On January 24, 1983, the appellants requested the Supreme Court of Alabama to issue a certificate stating that the court had considered and passed upon the constitutional issues first raised on rehearing by the appellants. In their transmittal letter to the court, the appellants recognized that "the question will most certainly be raised whether the [Supreme Court of Alabama] considered and passed upon the constitutional ques-

[10]Alice Elmore, one of the eleven individual appellants here, intervened in that Commission complaint proceeding and was represented there by the same counsel who represented these appellants before the Supreme Court of Alabama, and who represents the appellants before this Court. No appeal was taken from the Commission's order in that complaint proceeding establishing the new energy cost recovery procedure.

[11]The appellants do not challenge this determination of mootness by the Supreme Court of Alabama. (Jurisdictional Statement, p. 7).

tions raised by Appellants in their Application for Rehearing." This letter dated January 24, 1983 to the Supreme Court of Alabama is attached hereto as Appendix A. By order dated February 17, 1983, the court declined to issue the requested certificate, stating:

> The appellant having filed in this Court a request for certification from the Supreme Court of Alabama that certain issues were expressely considered and passed upon in the overruling of the application for rehearing by this Court, without opinion, on November 5, 1982, and the response thereto, having been submitted and duly examined and understood by the Court, it is considered that the request for certification be, and the same is hereby, denied.

This February 17, 1983 order of the Supreme Court of Alabama is attached hereto as Appendix B.

SUMMARY OF ARGUMENT

A. The Alabama supersedeas statutes challenged by the appellants were never drawn in question before the Supreme Court of Alabama. Because the appellants did not invoke these statutes, the court below had neither an opportunity nor an occasion to interpret them. Thus, this appeal fails to satisfy the statutory jurisdictional requirement that a federal challenge to a state statute must be presented first to the state court. 28 U.S.C. § 1257; *Webb v. Webb*, 451 U.S. 493 (1981); Supreme Court Rule 16.1 (a).

B. The appellants first attempted to raise their federal challenge to the state statutes in an application for rehearing following a decision by the Supreme Court of Alabama dismissing the appeal below as moot. That ruling was in conformity with earlier decisions by the court under virtually identical fact situations. *Airco, Inc. v. Alabama Public Service Commission*, 360 So. 2d 970 (Ala. 1978). The appellants were bound to anticipate such a similar ruling in their appeal, and consequently, their federal question was neither properly nor timely raised. As a result, the Supreme Court of Alabama

neither considered nor passed upon the federal question. Under prior decisions of the Court, this appeal is due to be dismissed for failure to raise properly the federal challenge. *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120 (1945); *Herndon v. Georgia,* 295 U.S. 441 (1935).

C. The decision of the Supreme Court of Alabama rests on adequate and independent state law grounds. In a long line of cases, the court has interpreted the Alabama statutory scheme of utility rate regulation as not allowing reparations in connection with Commission orders on appeal. This state law principle was the basis for the dismissal of the appeal below. The court did not rule adversely to the appellants' federal question, because no such federal question was before the Supreme Court of Alabama when it held the case was moot. *Airco, Inc. v. Alabama Public Service Commission,* 360 So. 2d 970 (Ala. 1978); *Foshee v. General Telephone Co. of the Southeast,* 295 Ala. 70, 322 So. 2d 715 (1975); *T. R. Miller Mill Co. v. Louisville & Nashville Railroad Co.,* 207 Ala. 253, 92 So. 797 (1921).

D. No substantial federal questions are presented in this appeal challenging the Alabama supersedeas statutes. The cases relied upon by the appellants in support of their due process and equal protection claims are not applicable. These decisions are particularly inapplicable in the context of utility rate regulation, which is a function of the state legislature and a creature of state statute. *Ortwein v. Schwab,* 410 U.S. 656 (1973); *United States v. Kras,* 409 U.S. 434 (1973); *City of Birmingham v. Southern Bell Telephone & Telegraph Co.,* 234 Ala. 526, 176 So. 301 (1937).

ARGUMENT

Before presenting the grounds supporting this motion to dismiss, it is appropriate to discuss the substance and legal basis of the decision on the merits below by the Supreme Court of Alabama. The court held that the appeal was moot because: (i) during the pendency of the appeal, the Commission estab-

lished a new schedule of retail electric rates pursuant to an unrelated complaint proceeding, which schedule replaced the rates challenged by the appellants, and (ii) absent a stay or supersedeas, rates established by the legislative body are the only lawful rates and no refunds to customers or retroactive collections by the utility are permitted, even if the rates are later judicially disapproved on appeal. Contrary to the assertions of the appellants, the Supreme Court of Alabama did *not* rule that the posting of a supersedeas bond is a "precondition to restitution," for it has long been the rule in Alabama that common law principles of restitution are not applicable to legislative rate matters. *Airco, Inc. v. Alabama Public Service Commission*, 360 So. 2d 970 (Ala. 1978); *Foshee v. General Telephone Co. of the Southeast*, 295 Ala. 70, 322 So. 2d 715 (1975); *Alabama Gas Corp. v. Wallace*, 293 Ala. 594, 308 So. 2d 674 (1975); *State v. Alabama Public Service Commission*, 293 Ala. 553, 307 So. 2d 521 (1975); *T. R. Miller Mill Co. v. Louisville & Nashville Railroad Co.*, 207 Ala. 253, 92 So. 797 (1921).

A. The Alabama Supersedeas Statutes Were Never Drawn in Question

The appellants' constitutional challenge is directed against certain Alabama statutes, which provide for appeals from and a stay or supersedeas of rate orders of the Commission.[12] Although the appellants did perfect an appeal directly to the Supreme Court of Alabama pursuant to Alabama Code § 37-1-140 (Supp. 1982), they *never* attempted to stay or supersede the Commission's order under the procedures set forth in the challenged statutes, or by any other means. Because the challenged statutes were never "drawn in question" before the court below, this appeal suffers from a fundamental and fatal jurisdictional defect.

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[12]The statutes, which are referred to herein as the "Alabama supersedeas statutes," are set forth as Appendix E to the appellants' Jurisdictional Statement. Ala. Code §§ 37-1-125 through 37-1-130; 37-1-140 through 37-1-141 (1975 & Supp. 1982).

No individual residential customer of a utility, including the appellants herein, has ever invoked the Alabama supersedeas statutes in conjunction with the direct appeal of a Commission rate order. Consequently, the Supreme Court of Alabama has never had an occasion or an opportunity to interpret these statutes as they might apply to such an individual customer. The appellants cannot now mount a constitutional challenge to a statutory scheme which was never applied to them, adversely or otherwise.

In prior appeals before the Supreme Court of Alabama, various utilities have invoked the Alabama supersedeas statutes, and a substantial body of case law has evolved as the court has had an opportunity to interpret those statutes as they apply to utility companies. The mere act of filing an application for supersedeas by a utility does not automatically stay the Commission's rate order. Rather, the court has held that the granting of supersedeas is not a ministerial act, but requires the exercise of sound judicial discretion based on a factual showing by the utility that the Commission's order probably results in an unconstitutional taking of the utility's property without just compensation. *See, e.g., Brewer v. General Telephone Co.*, 283 Ala. 465, 218 So. 2d 276 (1969). In all such cases where the court has determined that supersedeas is appropriate, the utilities have been required to post the statutorily prescribed bond.

The Alabama supersedeas statutes provide that a "utility, interested party or intervenor may supersede [a Commission rate order] by giving such supersedeas bond or bonds as may be appropriate." Ala. Code § 37-1-125 (1975). The subsequent sections of the statute specify that the "appropriate bond" for an appealing *utility* is double the estimated amount by which revenues will be increased during the next six months. Ala. Code §§ 37-1-126 through 37-1-130 (1975). The question of what constitutes an "appropriate bond" for an individual residential customer has never been considered by the Supreme Court of Alabama. Similarly, the factual showing necessary to obtain a stay or supersedeas under the challenged statutes and

the general standards governing the court's consideration of that showing are unknown. The appellants' "factual" assertion that a $50 million bond would have been required is nothing more than pure conjecture on their part. The Supreme Court of Alabama was never called upon to make that determination.[13]

In addition to the appellants' failure to draw in question the challenged statutes, they did not pursue other possible avenues of protection. The appellants did not oppose the discharge of the Company's supersedeas bonds, which bonds were already in place as a result of the Company's prior appeals. These bonds were discharged *after* the Commission had entered the settlement order from which the appellants appealed. Under appropriate circumstances, the court *might* have required the Company to maintain an appropriate bond to protect the appellants during the pendency of their appeal. Further, the appellants did not attempt to invoke the court's inherent power to issue remedial and extraordinary writs. *See* Ala. Const. of 1901, Art. VI, Amend. No. 328, § 6.02; Alabama Rules of Appellate Procedure, Rule 21.

In order for the Court to take jurisdiction of this appeal, the Alabama supersedeas statutes must have been "drawn in question" by the appellants. 28 U.S.C. § 1257; *Crowell v. Randell*, 35 U.S. (10 Pet.) 367, 390-97 (1836). This was not done. The powerful policy considerations underlying this statutory requirement (as incorporated in Rule 16 of the Court) have often been articulated by this Court, and do not require repetition. *See, e.g., Webb v. Webb*, 451 U.S. 493, 498-501 (1981); *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969).

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[13]The appellants at one point were willing to agree to the settlement rate level if a $3.00 monthly customer service charge was incorporated in the residential rate design (instead of the $3.75 charge ultimately approved by the Commission). If this was their principal objection to the Commission's order, an "appropriate bond" for each of these eleven customers *might* have been as little as 75 cents per month. Even assuming these appellants would have had to post a bond in double this amount for six months, that bond would have been $9.00 per individual. Under this interpretation, the total bond for all eleven appellants would have been less than half the docketing fee of this appeal.

The entire basis of the appellants' challenge to the statutes is their own assumed interpretation of these statutes. In order to consider this appeal on the merits, this Court would necessarily be required to interpret state statutes which have never been properly drawn in question by the appellants or interpreted by the Supreme Court of Alabama. Under both 28 U.S.C. § 1257 and Rule 16.1 (a) of the Court, this appeal is due to be dismissed.

B. The Federal Challenge to the Statutes Was Neither Properly or Timely Raised, Nor Passed upon by the Court Below

The appellants concede that the Alabama supersedeas statutes were not alleged to be unconstitutional until *after* their appeal had been adjudged moot and consequently dismissed by the court below. The first reference to the statutes now challenged in this appeal appeared in the appellants' application for rehearing. (Jurisdictional Statement, pp. 2, 6-7; Appendix D, p. 11a). That application for rehearing was denied by the Supreme Court of Alabama without opinion. (Jurisdictional Statement, p. 7; Appendix B).

It is the rule of this Court that federal questions which are raised for the first time on rehearing are *untimely* unless the court below entertains the petition and expressly decides the question. *See, e.g., Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120 (1945); *Herndon v. Georgia,* 295 U.S. 441 (1935). Indeed, this Court assumes that a federal question was not properly presented when the state court does not pass upon the question, unless the aggrieved party in this Court can affirmatively show to the contrary. *Webb v. Webb,* 451 U.S. 493, 495-96 (1981); *Fuller v. Oregon,* 417 U.S. 40, 50 n.11 (1974), *citing Street v. New York,* 394 U.S. 576, 582 (1969).

There can be no doubt that the Supreme Court of Alabama did not pass on any federal question when it denied the appellants' rehearing request. In recognition of this defect in their appeal, the appellants later requested the Supreme Court of Alabama to issue a certificate stating that the federal ques-

tion presented in their application for rehearing was in fact entertained and adversely ruled upon by the court (Appendix A).[14] In response to this request, the court issued an order expressing its understanding of the purpose of the certificate, and specifically declining to issue said certificate (Appendix B). Thus, the federal question untimely raised by these appellants was not passed upon by the highest state court in Alabama, and this appeal is due to be dismissed.

Although certain limited exceptions to the above-stated rule regarding timeliness have evolved, none of these exceptions govern this appeal. The appellants apparently seek to fall within one such exception by vaguely implying that the dismissal of their appeal below was the result of an unexpected statutory interpretation by the court. Thus, the appellants might claim that they had no reason to anticipate or opportunity to assert the federal question before filing their application for rehearing. Any such assertion is unavailing because: (i) the Supreme Court of Alabama made no interpretation of the supersedeas statutes whatsoever, insofar as these statutes were never invoked, and (ii) the dismissal for mootness was in conformity with prior decisions of that court.

In a prior case involving facts virtually identical to those at hand, the Supreme Court of Alabama dismissed an appeal as moot because the rate schedules at issue were supplanted by new rates approved by the Commission and no supersedeas bond had been posted in conjunction with the appeal. *Airco, Inc. v. Alabama Public Service Commission*, 360 So. 2d 970 (Ala. 1978); *see also* cases cited therein.[15] This Court has held

[14]The untimeliness and improper presentation of the federal question in this appeal is also revealed when the purpose of the challenged statutes is considered. By definition, the Alabama supersedeas statutes are designed to stay, under appropriate circumstances, the effect of the Commission order during the pendency of an appeal of that order. These statutes cannot be timely invoked or properly challenged in a rehearing petition filed *after* the appeal (during which the stay would have been effective) has been dismissed as moot.

[15]In *Airco*, certain industrial customers of the Company appealed from an order of the Commission granting an interim rate increase. During the pendency of that appeal, the interim rates were replaced by another set

that an appellant is presumed to know of relevant prior court rulings, and is bound to anticipate a similar ruling in his own case. *Herndon v. Georgia*, 295 U.S. 441, 446 (1935). Thus, an appellant must take appropriate and timely action before the state court in order to preserve his right to review before the Supreme Court of the United States. Under the rule in *Herndon*, these appellants cannot plead ignorance of the prior ruling of the Supreme Court of Alabama in *Airco*.[16]

This Court's prior rulings regarding the untimeliness of federal questions first raised on rehearing are dispositive of the instant appeal. Consequently, this appeal is due to be dismissed because the federal question was not properly or seasonably presented below.

C. The Decision Below Rests on Adequate and Independent State Law Grounds

Under Alabama law, there can be no refunds or back collections as a result of an appeal from a Commission rate order, even if that rate is judicially disapproved at a later time as being either excessive or inadequate. There is no common law or equitable remedy for the recovery of charges prescribed by an order of the Commission.[17] *Airco, Inc. v. Alabama Public Service Commission*, 360 So. 2d 970 (Ala. 1978); *Foshee v.*

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of rate schedules. The court dismissed the appeal as moot, holding that, because there was no supersedeas bond posted, the charges collected during the pendency of that appeal were collected under the only lawful rate established by the Commission. Consequently, no refunds could be ordered and there was no effective remedy which could be granted if the appeal was allowed to continue. Insofar as the court will not issue purely advisory opinions, the appeal there was, as here, dismissed.

[16]The *Airco* decision was cited in support of the appellees' motion to dismiss the appeal below, and was recognized in a responsive pleading by the appellants as correctly setting forth the law of Alabama regarding the unavailability of reparations in the context of appeals from orders of the Commission.

[17]The appellants' repeated references to "basic hornbook law," the common law roots of restitution, and "other civil appellants" are irrelevant in view of the fact that regulation of utilities is in derogation of the common law, and the rights and procedures thereunder are solely creatures of state statute.

General Telephone Co. of the Southeast, 295 Ala. 70, 322 So. 2d 715 (1975); *Alabama Gas Corp. v. Wallace*, 293 Ala. 594, 308 So. 2d 674 (1975); *State v. Alabama Public Service Commission*, 293 Ala. 553, 307 So. 2d 521 (1975); *T. R. Miller Mill Co. v. Louisville & Nashville Railroad Co.*, 207 Ala. 253, 92 So. 797 (1921). This fundamental state law principle is grounded in the Alabama statutory scheme of regulation and the separation of powers doctrine embodied in the state constitution, together with other compelling public policy considerations regarding the need for rate stability.[18]

In Alabama, as elsewhere, ratemaking is solely a function of the legislative branch of the state government. *City of Birmingham v. Southern Bell Telephone & Telegraph Co.*, 234 Ala. 526, 176 So. 301 (1937). Consequently, the only lawful rates which can be charged by the utility are those established by the Commission pursuant to the delegated power of the legislature (the "single rate doctrine"). Ala. Code § 37-1-97 (1975). If the judiciary attempted to order refunds or permit retroactive collections without having first stayed or superseded the rate prescribed by the Commission, the judiciary would, in effect, be setting rates for that prior period, in violation of the state constitution.[19] Ala. Const. of 1901, Art. III, § 43. Further, such action by the court would be "utterly subversive of the policy and utility of any system of rate regulation," because "no rate could be relied upon as stable." *T. R. Miller Mill Co.*

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[18]The appellants are wrong in their claim that the rule in Alabama regarding the unavailability of reparations "is premised on an apparent misconstruction of precedent emanating from this Court . . .". (Jurisdictional Statement, pp. 21-23). The rule in Alabama is *not* based on the Court's decision in Arizona Grocery Co. v. Atchinson Topeka & Santa Fe Ry. Co., 284 U.S. 370 (1932). Rather, this rule is based upon state statutes and regulatory policy interpreted by the Supreme Court of Alabama in T. R. Miller Mill Co. v. Louisville & Nashville R.R. Co., 207 Ala. 253, 92 So. 797 (1921) – a decision which predates *Arizona Grocery*.

[19]The principal role of the court is to determine whether the Commission has performed its ratemaking function within statutory and constitutional bounds. City of Birmingham v. Southern Bell Tel. & Tel. Co., 234 Ala. 526, 176 So. 301 (1937).

v. Louisville & Nashville Railroad Co., 207 Ala. 253, 258, 92 So. 797, 802 (1921).

At the time the Supreme Court of Alabama ruled that the appellants' appeal below was moot and due to be dismissed there was no statutory supersedeas bond in place, nor had any request for supersedeas or other stay been presented to the court. In accordance with the above-stated principles and following the submission of briefs by all parties, the court determined that no effective relief could be granted and thus dismissed the appeal. Most certainly, the Supreme Court of Alabama did *not* rule adversely to the federal question now presented to this Court, because that constitutional issue was not even before the state court at the time it ruled on the merits of the appeal. The court's ruling below was based upon the application of the single rate doctrine described above to the facts and issues before the court at that time — an adequate and independent state law ground.

D. This Appeal Does Not Present a Substantial Federal Question

Although the appellants attempt to raise a constitutional challenge to the Alabama supersedeas statutes without ever drawing those statutes in question, it is apparent from the Jurisdictional Statement that they do not desire to come within the ambit of those statutes. These appellants do not want the ability, upon a proper showing, to obtain a stay or supersedeas during the pendency of an appeal; they want this Court to upset the established Alabama statutory scheme and related case law under which the single rate doctrine evolved. In short, the appellants seek a direction from this Court that a requirement of "restitution" be grafted onto existing state law as it relates to utility rate appeals.[20] Rather than presenting a sub-

[20]Even if the appellants were successful in maintaining this appeal and this Court declared the Alabama supersedeas statutes to be unconstitutional, it does not follow that the appellants would be entitled to reparations in their appeal. (Jurisdictional Statement, p. 7). The Alabama single rate doctrine would remain as a bar to reparations for these appellants.

stantial federal question, the appellants seek a ruling from this Court on a matter which is totally governed by state law.

The appellants' alleged due process claim is predicated on this Court's ruling in *Boddie v. Connecticut*, 401 U.S. 371 (1971), where the Court held that a state statute requiring the payment of various fees in order to obtain a divorce was unconstitutional as applied to indigent persons.[21] In so doing, however, the Court emphasized the importance of the marriage relationship in our society, and characterized that relationship as "fundamental" within the ambit of First Amendment protections. 401 U.S. at 382-83. This important feature has been reiterated in several subsequent decisions of this Court, where the reasoning in *Boddie* was distinguished and held inapplicable to purely economic or social interests. *See Ortwein v. Schwab*, 410 U.S. 656, 658-59 (1973) (welfare benefits); *United States v. Kras*, 409 U.S. 434, 444 (1973) (discharge in bankruptcy).

Individual consumers have no interest involved in the area of utility rate regulation which rises to the level of the marriage relationship found by the Court in *Boddie* to be "fundamental." In Alabama, as elsewhere, customers of a utility have no property right in any given level of utility rates. *City of Birmingham v. Southern Bell Telephone & Telegraph Co.*, 234 Ala. 526, 530, 176 So. 301, 303 (1937). *See, e.g., Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 318 (1933); *Georgia Power Project v. Georgia Power Co.*, 409 F. Supp. 332 (N.D. Ga. 1975); *Sellers v. Iowa Power & Light Co.*, 372 F. Supp. 1169 (S.D. Iowa 1974); *Holt v. Yonce*, 370 F. Supp. 374 (D.S.C. 1973), *aff'd*, 415 U.S. 969 (1974); *Georgia Power Co. v. Allied Chemical Corp.*, 233 Ga. 558, 212 S.E.2d 628, 630-32 (1975); *State v. Public Service Commission*, 532

[21] In *Boddie*, the Court observed that there was no dispute as to the indigent status of the appellants therein because this fact was established through affidavits in the record. In this appeal, however, the record below does not contain similar affidavits or other evidence. Indeed, these appellants have made no attempt to proceed *in forma pauperis* either in the proceedings below or here. *Compare* Ortwein v. Schwab, 410 U.S. 656, 658 (1973).

S.W.2d 20, 31-32 (Mo. 1975), *cert. denied sub nom. Jackson County, Missouri v. Public Service Commission*, 429 U.S. 822 (1976). Insofar as no such property rights exist with respect to appeals by individual customers from rate orders of the Commission, the Alabama supersedeas statutes do not offend the appellants' rights of due process. Further, as was noted by this Court in *Ortwein v. Schwab*, 410 U.S. 656, 659-60 (1973), the appellants received a full agency hearing before the Commission (their elected representatives), which hearing was not conditioned on the payment of any fee or the posting of any bond.

Although the appellants attempt to bolster their due process argument by raising the spectre that an "unreasonable rate might very well lead to a termination of utility service," there is no logical connection between this assertion (made without any evidentiary support below) and the appeal herein. (Jurisdictional Statement, pp. 18-19). The appellants never sought a stay of the Commission's order below, and they now expressly disclaim any "desire to stay the effect of the [Commission's] judgment" during the pendency of an appeal. (Jurisdictional Statement, p. 12). Yet, a stay (and *not* "restitution") would be the only effective means whereby the appellants would be protected from any alleged termination resulting from the order on appeal. These inapposite assertions and requests by the appellants undermine their claim that a fundamental right similar to that found in *Boddie* is involved here.

The appellants' equal protection claims are grounded on this Court's decision in *Lindsey v. Normet*, 405 U.S. 56 (1972), where an Oregon "double bond" appeal statute was found to be violative of the Equal Protection Clause of the Fourteenth Amendment. The Oregon statute reviewed in *Lindsey* is readily distinguishable from the Alabama supersedeas statutes and thus the appellants' reliance upon the reasoning in *Lindsey* is misplaced. In that case, the Court noted the following crucial facts: (i) the filing of the double bond was a *precondition* to the taking of an appeal; (ii) the double bond was required *in addition to* the general civil appeal bond; (iii) both the

double bond and the general civil appeal bond were based upon the rental value of the property from which the appellant had been evicted; (iv) the double bond was *forfeited* to the landlord if the judgment was affirmed on appeal, without regard to actual damages; and (v) under an unrelated statute, the landlord could bring a separate action at law for payment of the back rent.

Under the challenged Alabama supersedeas statutes and the general law of the state, *none* of the above-cited factors are present.[22] A direct appeal to the Supreme Court of Alabama may be taken from a rate order of the Commission without the posting of any supersedeas bond. Ala. Code § 37-1-140 (Supp. 1982). If such an appellant prevails on the merits of his appeal, he will reap the benefits of that success prospectively.[23] The only bond required to prosecute an appeal in Alabama is one which covers court costs, and even this bond is waived for appeals maintained *in forma pauperis*. Alabama Rules of Appellate Procedure, Rule 24. Unlike the Oregon statute, which reflected the *known* rental value of the property in dispute, the Alabama supersedeas statutes are based upon *estimated*

[22]Insofar as no individual residential customer, indigent or otherwise, has ever attempted to obtain supersedeas under this statutory scheme, it is unknown whether and under what circumstances this "doubling" aspect of the statutes would be applied. Further, assuming this "doubling" aspect would apply, it is unknown what would be doubled, *i.e.*, the entire rate order, the order as it relates to the residential class, or the rate order as it relates to the individual applicant for supersedeas. The appellants herein assume the answers to these and other such questions as to how these statutes would be applied in this as yet hypothetical situation.

[23]Generally, reparations cannot be granted under Alabama law because of the single rate doctrine, which presumes that an order of the Commission, though later judicially disapproved, was nevertheless the single lawful rate in effect during the pendency of the appeal (absent a stay of the order). If on appeal the court determines that the order was void *ab initio*, that order was not "lawful", and consequently, charges collected thereunder may have to be returned. Wallace v. Alabama Power Co., Case No. 78-120B, unreported order issued January 18, 1979. Although the appellants contended, among other things, that the Commission's order was void because it was the product of a settlement, the Supreme Court of Alabama implicitly rejected this contention when the appeal below was determined to be moot.

future electrical consumption for a six month period. Ala. Code §§ 37-1-127, 37-1-128 (1975). By definition, this estimating process cannot precisely anticipate and incorporate all of the many variables which could significantly affect electrical usage, such as weather, load growth and economic conditions. In short, unlike future rent, future electrical consumption cannot be predicted with mathematical precision.[24] Further, the supersedeas statutes require that the bond, if allowed, be conditioned to pay other damages above and beyond the amounts collected subject to refund, plus interest. Ala. Code §§ 37-1-128, 37-1-141 (1975 & Supp. 1982). If the Commission's order on appeal is affirmed, the supersedeas bond is not forfeited, but stands only to ensure that any actual damages occasioned by the stay are compensated. Finally, the amount of the supersedeas bond must be adequate to cover all such damages, because in Alabama no separate action at law can be maintained other than one to enforce the bond. Ala. Code § 37-1-135 (1975).

Utility rate regulation is a matter that is uniquely within the realm of state law.[25] The federal questions raised by the appellants, if any, are so unsubstantial that an excursion by this Court into this area of state law is neither necessary nor warranted.

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[24]If the Supreme Court of Alabama were presented with a request for supersedeas by an individual residential customer and interpreted the supersedeas statute as allowing that customer to stay the Commission order as to his bill only, the uncertainty of this estimating feature of the statutory scheme would be increased dramatically. This is because an individual has total control over his own level of electric consumption.

[25]This principle has been recognized by Congress, as evidenced in the passage of the Johnson Act. 28 U.S.C. § 1342. That Act severely restricts the power of federal district courts to enjoin, suspend or restrain state commission rate orders.

CONCLUSION

For the foregoing reasons, the motion to dismiss should be granted.

Respectfully submitted,

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Dated: March 24, 1983

APPENDIX A

LEGAL SERVICES CORPORATION OF ALABAMA
Montgomery Regional Office

January 24, 1983

Chief Justice and Associate Justices
of the Supreme Court of Alabama
Judicial Building
Post Office Box 157
Montgomery, Alabama 36101

RE: *Jeremiah Temple, et al., v. Alabama Public Service Commission, et al.*, S.C. No. 80-462

Dear Mr. Chief Justice and Associate Justices:

On November 5, 1982, this Court overruled Appellants' Application for Rehearing in the above-styled cause and dismissed their appeal as being moot, *per curiam*, and without written opinion. On Application for Rehearing, Appellants had raised serious constitutional challenge to certain provisions of the Alabama Code governing appeals in utility rate cases, *viz*, those sections of the Code which, as applied, require the posting of a stay or supersedeas bond as a precondition to restitution in appeals from utility rate cases, Sections 37-1-141 and 37-1-125 through 37-1-130 of the Code of Alabama (1975).

Appellants are considering an appeal to the Supreme Court of the United States from this Court's order dated November 5, 1982; however, since this Court did not issue any written opinion on rehearing, the question will most certainly be raised whether the Court considered and passed upon the constitutional questions raised by Appellants in their Application for Rehearing — even though it must be assumed that the Court did so, as it took the Court well over a year to rule on Appellants' application.

Since the costs involved in taking an appeal to the Supreme Court are substantial, Appellants are desirous of obtaining

from this Court, in advance of the taking of their appeal, certification of the fact that the Court did consider and pass upon the constitutional issues raised by these Appellants on rehearing, and did determine the questions adversely to the Appellants. For the convenience of the Court, I have prepared a certificate which so states and pray the Court to execute same at its earliest possible convenience.

Sincerely,

/s/ ROBERT J. VARLEY

Attorney for Appellants

cc: All parties of record

APPENDIX B

February 17, 1983

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1982-83

80-462

JEREMIAH TEMPLE, et al.

v. APSC DOCKET NO. 17667

THE ALABAMA PUBLIC
SERVICE COMMISSION

ORDER

The appellant having filed in this Court a request for certification from the Supreme Court of Alabama that certain issues were expressly considered and passed upon in the overruling of the application for rehearing by this Court, without opinion, on November 5, 1982, and the response thereto, having been submitted and duly examined and understood by the Court, it is considered that the request for certification be, and the same is hereby, denied.

Torbert, C. J., and Maddox, Jones, Almon, Shores, Embry, Beatty, and Adams, JJ., concur.

Faulkner, J., not sitting.

I, Dorothy F. Norwood, as Acting Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 18th day of Feb., 1983

/s/ DOROTHY F. NORWOOD
Acting Clerk, Supreme Court of Alabama